

DIAGNOSTIC COPY ORIGINAL

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of Sections of the)
Cable Television Consumer)
Protection and Competition Act of)
1992; Fifth Notice of)
Proposed Rulemaking)
)

MM Docket 92-266

RECEIVED

JUL 29 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

Richard E. Wiley
Philip V. Permut
Peter D. Ross
Michael K. Baker
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

July 29, 1994

No. of Copies rec'd
List ABCDE

0 + 4

TABLE OF CONTENTS

	<u>Page</u>
I. VIACOM'S PROPOSAL FOR AN ENHANCED MARK-UP ON LICENSE FEE INCREASES RESPONDS TO THE STRONG RECORD SUPPORT FOR GREATER, BUT STILL NEUTRAL, INCENTIVES FOR PROGRAMMING INVESTMENT	2
II. ANY FCC GUIDELINES ALLOWING MIGRATION OF PROGRAM SERVICES TO A LA CARTE CARRIAGE SHOULD NOT ARTIFICIALLY ENCOURAGE SUCH MIGRATION, NOR ABROGATE CONTRACTUAL OBLIGATIONS	5
III. CONCLUSION	6

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Sections of the) MM Docket 92-266
Cable Television Consumer)
Protection and Competition Act of)
1992; Fifth Notice of)
Proposed Rulemaking)
)
Rate Regulation)

To: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom"), by its attorneys, hereby submits these reply comments on the Commission's Fifth Notice of Proposed Rulemaking in the above-captioned proceeding,¹ which seeks to refine the going-forward rules for cable rate regulation. The opening comments in this proceeding demonstrate a strong consensus that the interests of the viewing public in the continued availability of a diverse and growing array of affordable program services require substantially increased incentives for operator investment in regulated programming.

Viacom submits these reply comments to address certain issues raised by commenters that bear significantly on the public interest in programming investment. First, Viacom urges the Commission to not only establish enhanced

¹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Fourth Report and Order and Second Order on Reconsideration, 77 Rad. Reg.2d (P&F) 1077 (1994).

programming investment incentives, but also ensure that the incentives apply fairly to both existing and new program services alike; specifically, Viacom recommends that the FCC replace its current 7.5 percent mark-up on license fee increases with a more meaningful enhanced mark-up scheme based on an operator's embedded margin under the benchmark. Second, Viacom believes that the Commission, in responding to cable operators' calls for FCC-sanctioned migration of a limited number of regulated services, should not authorize migration that violates a programmer's affiliation agreement; furthermore, in the absence of an express provision, the Commission should require the programmer's explicit consent before a channel may be removed from a regulated tier to a la carte carriage.

I. VIACOM'S PROPOSAL FOR AN ENHANCED MARK-UP ON LICENSE FEE INCREASES RESPONDS TO THE STRONG RECORD SUPPORT FOR GREATER, BUT STILL NEUTRAL, INCENTIVES FOR PROGRAMMING INVESTMENT

It is critical to the 1992 Cable Act's broad goal of promoting programming that the FCC establish increased incentives for operator investment in programming not only for the addition of new channels, but also to maintain and to continue to improve the quality of existing channels. Thus, consistent with the strong record support for program service-neutral incentives, any enhanced mark-up for adding a new channel to a regulated tier should also be accompanied by

an increased mark-up on increases in the license fees of already-carried regulated program services.²

Commenters in this proceeding have concurred with Viacom that the current incentives under the going-forward rules are inadequate to encourage either the launch of new program services or the continued and growing support of existing services.³ Many programmers also agreed that the Commission's rules should not favor one class of programmers over another, but should be neutral in design and effect. While some parties addressed this issue as it concerns the

² While many commenters have advocated an enhanced flat-fee mark-up for the addition of new channels, Viacom believes that such a mark-up should apply only to a net increase in the number of channels on a regulated tier, not to new program services substituted for existing services carried on channels already in use on a tier. See Comments of Viacom International Inc. in MM Docket No. 92-266 (filed June 29, 1994) at 7 ("Viacom").

³ See, e.g., Viacom at 1-10; Comments of CATA in MM Docket No. 92-266 (filed June 29, 1994) at 2-5; Comments of Cablevision Industries Corporation in MM Docket No. 92-266 (filed June 29, 1994) at 1-10; Comments of Discovery Communications, Inc. in MM Docket No. 92-266 (filed June 29, 1994) at 5-10 ("Discovery"); Comments of Providence Journal Co. et al. in MM Docket No. 92-266 (filed June 29, 1994) at 2-9 ("Providence Journal"); Comments of Jones Educational Networks in MM Docket No. 92-266 (filed June 29, 1994) at 2-5; Comments of Liberty Media Corporation in MM Docket No. 92-266 (filed June 29, 1994) at 3-9; Comments of Lifetime Television in MM Docket No. 92-266 (filed June 29, 1994) at 2-16 ("Lifetime"); Comments of NCTA in MM Docket No. 92-266 (filed June 29, 1994) at 5-9; Comments of TCI Comments in MM Docket No. 92-266 (filed June 29, 1994) at 21-29 ("TCI"); Comments of Time Warner Cable in MM Docket No. 92-266 (filed June 29, 1994) at 2-7; Comments of Turner Broadcasting System, Inc. in MM Docket No. 92-266 (filed June 29, 1994) at 1-2 ("Turner"); Comments of USA Networks in MM Docket No. 92-266 (filed June 29, 1994) at 6-9.

addition of lower-cost or higher-cost program services, several commenters recognized the importance of treating equally already-carried program services and newly added services.⁴ Viacom concurs with these commenters that only by increasing the incentives in this evenhanded fashion will enhanced incentives serve the broad goal of promoting the growth of programming in the public interest.

While commenters have voiced general support for a substantial increase in the existing 7.5 percent mark-up as applied to license fee increases,⁵ Viacom has proposed a specific formula for enhancing this mark-up in a manner based directly on the underlying, by definition, reasonable benchmark rates. In particular, Viacom has suggested that the Commission adopt an enhanced mark-up on incremental increases in programming expenses that is equal to the average percentage margin embedded in a system's benchmark rates.⁶ The increased level of compensation allowed under this proposal would help ensure that existing cable networks

⁴ See, e.g., Discovery at 8-9; Lifetime at 13-16.

⁵ See, e.g., Discovery at 8-9; Turner at 1-2; Providence Journal at 6; Lifetime at 15-16. In advocating a substantial enhancement of the mark-up for channel additions, TCI alone stated, without support or explanation, that the 7.5 percent mark-up (which it found completely inadequate for channel additions) "may be appropriate" in the context of license fee increases. TCI at 29.

⁶ See Viacom at 8-9.

are able to obtain operators' indispensable support in improving the quality of their programming.

II. ANY FCC GUIDELINES ALLOWING MIGRATION OF PROGRAM SERVICES TO A LA CARTE CARRIAGE SHOULD NOT ARTIFICIALLY ENCOURAGE SUCH MIGRATION, NOR ABROGATE CONTRACTUAL OBLIGATIONS

Viacom urges the Commission to take special care in fashioning any guidelines in support of operator migration of program services from regulated tiers to a la carte carriage to ensure that FCC rules do not artificially encourage operators to remove regulated advertiser-supported program services. Moreover, the Commission should clarify that operators, in removing regulated program services, may not abrogate programming affiliation agreements.

As no public interest justification has been advanced to vitiate valid contractual provisions in programming affiliation agreements, the FCC should clarify that any increased flexibility for operators to remove regulated networks is subject to existing contractual obligations between an operator and a programmer. As Viacom stated in its initial comments, removal of advertiser-supported program services from widely-carried regulated tiers substantially reduces a network's advertising revenue base, thereby undermining a programmer's ability to deliver quality

programming to the viewing public at a reasonable price.⁷ Thus, if an affiliation agreement specifies, for example, that the network is to be carried on the most widely distributed level of service, an operator relying on FCC guidelines should not be allowed to abrogate this commitment by migrating the program service to a newly created a la carte package. Similarly, if a contract is silent as to the tier location of a program service, the affirmative consent of the programmer should be required before the service can be removed from a regulated tier. Such a policy would preserve the mutually agreed upon business plans of the parties and protect the economic expectations of programmers whose viability depends upon carriage on widely-distributed tiers.

III. CONCLUSION

The record supports FCC adoption of an enhanced mark-up on increases in the license fees of already-carried program services; the proposal advocated by Viacom would achieve this goal while also ensuring that subscriber rates remain reasonable. Viacom also submits that the Commission should stipulate that any FCC-sanctioned migration of regulated channels to a la carte carriage must be subject to operators' existing contractual obligations or, in the absence of any

⁷ See Viacom at 7.

express contractual provision, the programmer's explicit consent. Viacom respectfully requests that the Commission modify its going-forward rules in accordance with the principles and proposals recommended herein.

Respectfully submitted,

VIACOM INTERNATIONAL INC.

By: 

Richard E. Wiley
Philip V. Permut
Peter D. Ross
Michael K. Baker
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

July 29, 1994